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C O N F I D E N T I A L SECTION 01 OF 03 SARAJEVO 002201

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DEPARTMENT FOR EUR/SCE (FOOKS, STINCHCOMB) AND S/WCI  
(LAVINE)

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TAGS: [PREL](#) [ICTY](#) [KAWC](#) [PGOV](#) [PHUM](#) [PINR](#) [KJUS](#) [MCRM](#) [BK](#)  
SUBJECT: BOSNIA - WAR CRIMES AND JURISPRUDENCE

REF: A. SARAJEVO 1547  
[B](#). SARAJEVO 1403  
[C](#). SARAJEVO 1212  
[D](#). SARAJEVO 1068

Classified By: Michael J. Murphy. Reason 1.4 (b) and (d)

[1](#)1. (C) SUMMARY: The International Court of Justice (ICJ) verdict earlier this year and the deteriorating political situation have stirred renewed interest in the country,s fragmented judicial system and its ability to manage war crimes cases. The State Court,s potential war crimes workload has expanded well beyond what was anticipated when it was created. Many cases will have to be tried in entity and cantonal courts, whose poor track record managing war crimes cases was one reason the War Crimes Chamber at the State Court was created. The absence of a country-wide supreme court and lack of a common criminal code will contribute to an uneven ) and possibly contradictory -- development of war crimes jurisprudence and inconsistent treatment of indicted individuals. State Court President Judge Meddzida Kreso has proposed to remedy this situation by temporarily designating entity and cantonal judges as State Court judges to hear war crimes cases. Unfortunately, deficiencies in her proposal make its implementation problematic. Left unresolved, these judicial issues threaten to undermine our efforts at building state-level judicial institutions and erode public confidence in and support for the judiciary,s work in war crimes cases. END SUMMARY

War Crimes Cases: From Entity to State and Back Again  
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[1](#)2. (SBU) Before the creation of the State Court in 2002, war crimes cases could be tried in Republika Srpska (RS) and Brcko district courts and Federation cantonal courts once reviewed and approved by the International Criminal Tribunal for the former Yugoslavia (ICTY) under its &Rules of the Road& office. The State Court was granted exclusive jurisdiction for all war crimes cases initiated after March [1](#)2003. At the same time, all war crimes cases at the entity levels, except those where an indictment had been issued, were sent from the district and cantonal prosecutors to the Chief Prosecutor. The Chief Prosecutor was charged with reviewing these cases to determine whether they should be handled by his office, deemed &highly sensitive,& or by the district and cantonal courts, deemed &sensitive.& The Chief Prosecutor,s Office expects to finish reviewing these cases sometime early next year.

[1](#)3. (SBU) The State Court,s potential workload has expanded well beyond what was anticipated when it was created. The number of cases the ICTY will transfer to the State Court is

fairly well-known and finite, but the number of domestically-initiated cases and of those suspected perpetrators who may be deported to Bosnia have the potential of increasing and draining resources from other work. The Chief Prosecutor claims that there are potentially 13,000 war crimes complaints. There is good reason to question this number, but the exaggerated estimate, the political fallout from the February ICJ verdict, and the absence of a publicly stated strategy to deal with the numbers of realistic cases have all raised legitimate questions about the State Court's capacity to manage war crimes cases. The effort to craft a National Strategy for War Crimes Recovery (Reftel) is designed, in part, to address this issue. Because the State Court can not try all war crimes cases, a large number will likely go to District and Cantonal Courts for investigation and prosecution.

#### One Country, Five Criminal Codes

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¶4. (SBU) When trying war crimes cases, the State Court applies the 2003 State Criminal and Criminal Procedural Codes. The Federation, RS, and Brcko District, however, have their own criminal codes. In war crimes cases, all three also apply the old Socialist Federal Republic of Yugoslavia (SFRY) Criminal Code. There are important differences between the 2003 and other criminal codes that impact the handling of war crimes cases. For example, the State Code includes the charge of crimes against humanity and a broader definition of command responsibility, neither of which are part of the entity or SFRY codes. Defendants before the State Court also face stiffer sentences, since the State Criminal Code provides for a maximum prison sentence of up to 40 years; the other codes provide for a maximum sentence of

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20 years.

#### And Two Hunger Strikes

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¶5. (C) War crimes defendants before the State Court have claimed that the application of the more stringent State Criminal Code is a violation of their human rights, arguing that the criminal code in force in Bosnia at the time of their alleged crimes (i.e., the SRFY code) should be the one applied. About 30 defendants from three different correctional facilities in Bosnia went on a hunger strike for about three weeks in January to call attention to this issue. Court officials believe the hunger strike was essentially a sham. Inmates at the Kula detention facility in the Repbulika Srpska (RS) were believed to be secretly taking in food and drinks. Prison and hospital officials in the RS may also have been in collusion with the defendants on their hunger strike. For example, a Court official told us that after a 21-day hunger strike, these inmates had not lost much weight. In early September, the Kula inditees began another hunger strike in protest. The Court has stood firm both times and publicly said it would not give in to their demands. Regardless, the issues associated with the most recent hunger strike reinforce public perceptions, fueled by RS political leaders, that Serbs are not treated fairly by the Court.

#### Fragmented Judicial Structure

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¶6. (SBU) The 2003 Criminal and Criminal Procedural Codes were imposed on the State Court by HighRep Ashdown. At the time, the entities and Brcko pledged to harmonize their codes with the 2003 codes, but have not yet done so. If the State Court believes a district or cantonal court is mishandling a war crimes case, there is no legal mechanism for the State Court to reclaim or review the case once it has been transferred to the district or cantonal court. In addition, there is no superior court in Bosnia with the jurisdiction to ensure the

equal jurisprudence and similar sentences for similar conduct regardless of where a person is charged or tried for alleged war crimes. Cases tried in district or cantonal courts can only be appealed to the entity or Brcko supreme courts rather than the State Court,s appellate division. The creation of a State Supreme Court with overarching jurisdiction over all the courts in BiH would resolve this problem. (Note: It would also address other critical judicial reform issues. End Note) However, it would require the transfer of competency from the entities to the state and a constitutional amendment; neither is likely in the current political climate. Passage of a single state-level Criminal and Criminal Procedural code for all of Bosnia would also be politically problematic.

#### Constitutional Court Weighs In

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¶7. (SBU) The jurisdiction of Bosnia,s Constitutional Court is limited to constitutional issues; it is not a court of final review. However, in March 2007 it issued a ruling on an appeal filed by the first person convicted of war crimes by the State Court under the 2003 Criminal Code. In this case, the Constitutional Court determined that the application of the 2003 Criminal Code did not violate the defendant,s constitutional rights or those guaranteed under international law. (Note: The Bosnian Constitution incorporates the European Convention for the Protection of Human Rights. End Note) It concurrently ruled that entity courts have an additional obligation to consider the 2003 Criminal Code and other relevant laws and international documents when deciding on the war crimes offenses. However, the Constitutional Court has no mechanism for enforcing its ruling and can not require entity courts to apply the 2003 Criminal Code.

#### Court President Kreso Proposes A Solution

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¶8. (SBU) Cognizant of a growing number of war crimes cases and the absence of a single jurisprudence for war crimes cases, State Court President Meddzida Kreso has proposed that the State Court establish satellite offices in the major district and cantonal courts, including Brcko. Judges would be temporarily assigned to the State Court and apply the 2003 Criminal Code, but remain sitting in their entity courts. Any appeal would be heard by the State Court,s appellate division rather than by the local courts, thus allowing for

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more uniformity in the application and interpretation of the law. The State Court President would be responsible for managing the work of these satellite offices. This proposal would require amending the laws on the High Judicial and Prosecutorial Council and the State Court.

#### The Drawbacks

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¶9. (SBU) Kreso,s proposal, concerned primarily with harmonization of war crimes jurisprudence in Bosnia, is a good starting point for discussion on the issue, but it contains several deficiencies. She focuses almost exclusively on addressing the State Court component and ignores the investigative and prosecutorial needs associated with managing the burgeoning war crimes workload. State Court satellite offices would make little sense without companion branch offices for the Chief Prosecutor, but Kreso offers only a short paragraph on setting up similar satellite offices for the Prosecutor,s Office. Entity and Brcko authorities would likely resent having to pay the salaries of their judges and provide them with office space but be unable to assign them to other cases before the courts. Local officials have voiced concern to us about the lack of judges for their cases, and the Republika Srpska Justice Minister has already stated his opposition to this proposal. Finally, Kreso,s proposal is also silent on who would provide ) and

pay for ) support staff for satellite offices and ignores that there would also likely be costly infrastructure requirements.

Comment

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¶11. (C) The 18-month political deadlock, the ICJ verdict, and the lack of a publicized strategy to manage its work have prompted the international community and many within the Bosnian judicial establishment to reassess the capacity of Bosnia,s judicial framework and institutions to manage a burgeoning war crimes case load. The HighRep was begun a dialogue on wide-ranging and much-needed judicial reforms, many of which would improve Bosnia,s ability to manage politically contentious war crimes cases. Bosnian authorities have also launched their own initiatives (Reftel). They will likely need a strong assist from the international community to make any progress given the rivalries and personality conflicts among senior Bosnian judicial officials. We will remain engaged with the major players to maintain their focus on the issues rather than their personal agendas.

¶12. (C) With respect to criminal codes and war crimes, it is important to remember that common principles and a consistent interpretation of the law throughout Bosnia are critical to advance respect for the law, the institutions that enforce and apply it, and to ensure fundamental fairness. If left unresolved, the work of the State Court may become more politicized, undermining our efforts to build effective state-level judicial institutions. It may also erode public support for the judiciary,s work in war crimes cases.

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